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MOHD YAZID MOHD SAHARI v. MAJLIS PERBANDARAN HULU SELANGOR

HIGH COURT MALAYA, SHAH ALAM
CHOONG YEOW CHOY JC
[CIVIL APPEAL NO: BA-12ANCvC-12-04-2023]
B 20 MARCH 2024

Abstract – *The question on the mode of commencement of an action depends on the factual matrix of the case. If the claim is based solely on substantive principles of public law, the proper mode should be judicial review; judicial review, however, would not be suitable if the claim falls under private law, even if it concerns a public authority. In the event the claim concerns a mixture of public and private laws, the court must ascertain which of the two is more predominant.*

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CIVIL PROCEDURE: *Striking out – Writ and statement of claim – Appeal against – Action by tenant of lands against local authority at Sessions Court – Action premised upon torts of trespass and wrongful seizure of equipment – Sessions Court struck out tenant's writ and statement of claim on grounds of wrong mode of commencement of action and failure of action to disclose reasonable cause of action – Whether decision by Sessions Court correct – Rules of Court 2012, O. 18 r. 19(1)(a), (b) & (d)*

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CIVIL PROCEDURE: *Mode – Mode of commencement – Action by tenant of lands against local authority at Sessions Court premised upon torts of trespass and wrongful seizure of equipment – Tenant commenced action by way of writ and statement of claim – Whether proper mode of commencement – Whether judicial review proper mode of commencement – Directives in Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors*

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LOCAL GOVERNMENT: *Action by tenant of lands against local authority at Sessions Court – Action premised upon torts of trespass and wrongful seizure of equipment – Proper mode of commencement of action – Whether action disclosed reasonable cause of action*

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The appellant, the tenant of two vacant lands, had commenced an action at the Sessions Court against the respondent, premised upon trespass to land and wrongful seizure and subsequent failure, refusal and/or negligence by the latter to return a bulldozer machine which the former had rented. The respondent applied to strike out the appellant's writ and statement of claim, pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012 ('ROC'). The Sessions Court allowed the respondent's application on the grounds that (i) the appellant had utilised the wrong mode of commencement as the proper mode was by way of judicial review; and (ii) the appellant's action did not disclose any reasonable cause of action. Hence, the present

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appeal by the appellant. The issues that arose for determination were: (i) whether the appellant was entitled to commence the action at the Sessions Court by way of a writ action, as opposed to by way of judicial review; and (ii) whether the writ and statement of claim disclosed a reasonable cause of action within the meaning of O. 18 r. 19(1)(a) of the ROC.

Held (allowing appeal; setting aside decision of Sessions Court):

(1) The appellant was entitled to commence the action by way of writ. The directives in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* ('*Ahmad Jefri*') were clear in that: (i) the question as to which was the appropriate procedure to be used is dependent on the factual matrix of each case; (ii) once it has been established that a claim is based solely on substantive principles of public law, then the appropriate process should be by way of judicial review; (iii) if a matter is under private law, despite concerning a public authority, the judicial review was not suitable; and (iv) if it was a mixture of public and private laws, then the court must ascertain which of the two was more predominant. Based on *Ahmad Jefri*, there was a need for the court to ascertain whether it was the public law or private law element that was more predominant. The appellant's claim was not based solely on substantive principles of public law, therefore, it was incorrect to conclude that the appellant's only recourse was by way of judicial review proceedings. (paras 24, 26 & 27)

(2) The causes of action had been sufficiently set out or pleaded in the statement of claim. There were issues pertaining to the service of the various notices, the granting of consent/permission and elements of trespass and conversion that would have to be established and ventilated. This was not a plain and proper case for O. 18 r. 19(1)(a) to be invoked to justify the striking out of the writ and statement of claim. (paras 29-31)

Case(s) referred to:

Abdul Muthalib Hassan v. Maimoon Hj Abd Wahid [1992] 1 CLJ 88; [1992] 2 CLJ (Rep) 5 HC ***(refd)***

Ahmad Amryn Abd Malek & Ors v. Bursa Malaysia Securities Bhd [2021] 2 CLJ 222 HC ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Jik Teck Piling Sdn Bhd v. Jopp Builders Sdn Bhd [2014] CLJU 1916; [2014] 1 LNS 1916 HC ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Mak Yan Tai & Anor v. Chia Moy King & Ors [2020] CLJU 1022; [2020] 1 LNS 1022 HC ***(refd)***

OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd [2019] 10 CLJ 1 CA ***(refd)***
Perbadanan Pengurusan Rumah Pangsa Taman Tasik Utama Lot 11846 v. Metacorp Properties Sdn Bhd [2018] 2 CLJ 246 HC ***(refd)***
Rosli Yang Danian v. Datuk Mohd Zain Mohd Dom & Ors [2015] CLJU 1351; [2015] 1 LNS 1351 HC ***(refd)***
Syarikat Logistik Petikemas Sdn Bhd v. Maruzen SH Logistics Sdn Bhd [2020] CLJU 794; [2020] 1 LNS 794 HC ***(refd)***
YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor [2021] 8 CLJ 179 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 18 rr. 12, 19(1)(a), (b), (c), (d), O. 53

For the appellant - Manpal Singh Sachdev Manjit Singh & Helmi Zaharin; M/s Manjit Singh Sachdev Mohammad Radzi & Partners
For the respondent - Mohd Nazri Yahya & Jailani Moh Fari; M/s Nazri Yahya & Co

[Editor's note: Appeal from Sessions Court; Suit No: BA-A52NCvC-371-11-2022.]

Reported by Najib Tamby

JUDGMENT

Choong Yeow Choy JC:

Introduction

[1] The matter before this court concerns two basic aspects of practice and procedure. The first relates to the proper mode of commencement and the second appertains to the principle of striking out.

[2] The Sessions Court had allowed the respondent's (defendant in the Sessions Court) application to strike out the appellant's (plaintiff in the Sessions Court) writ and statement of claim pursuant to O. 18 r. 19(1)(a), (b) and/or (d) of the Rules of Court 2012. Dissatisfied with that decision, the appellant filed the present appeal before this court.

The Predominant Issues

[3] The twin principal issues in this appeal are:

(i) whether the appellant was entitled to commence the action in the Sessions Court by way of a writ action, as opposed to by way of judicial review; and

(ii) whether the writ and statement of claim disclosed a reasonable cause of action within the meaning of O. 18 r. 19(1)(a) of the Rules of Court 2012.

The Parties And The Pertinent Facts

[4] The appellant is one Mohd Yazid bin Mohd Sahari. The plaintiff is the tenant of two vacant lands which he has rented from the landlord for a two-year period, that is, from 15 May 2022 to 14 May 2024.

[5] The respondent is the Majlis Daerah Hulu Selangor.

[6] The appellant had commenced an action in the Sessions Court against the respondent by way of a writ action. The cause of action was premised on trespass to land and the wrongful seizure and the subsequent failure, refusal and/or negligence by the respondent to return a bulldozer machine which the appellant had rented. The reliefs sought were for, *inter alia*:

(i) amount of RM166,400 as at 5 October 2022;

(ii) interest at rate of 5% per annum calculated on a daily basis on amount of RM166,400 calculated from the 6 October 2022 to the date of full settlement;

(iii) general damages to be assessed by this court and to be paid by the defendant to the plaintiff;

(iv) punitive damages to be assessed by this court and to be paid by the defendant to the plaintiff; and

(v) costs.

The Decision Of The Sessions Court

[7] At the Sessions Court, the appellant's writ and statement of claim were struck out pursuant to O. 18 r. 19(1)(a) or (b) and/or (d) of the Rules of Court 2012 with costs.

[8] One of the grounds relied on by the learned Sessions Court Judge for the striking out of the appellant's writ and statement of claim was that the appellant has utilised the wrong mode of commencement. The Sessions Court held that the proper mode was by way of a judicial review process and this ground alone justified the striking out on the grounds of an abuse of the process of court.

[9] The Sessions Court also concluded that the appellant's suit did not disclose any reasonable cause of action within the meaning of O. 18 r. 19(1)(a) of the Rules of Court 2012.

The Parties' Contentions

[10] The essence of the appellant's case in this appeal is that the Sessions Court had erred in invoking O. 18 r. 19(1)(a) or (b) and/or (d) of the Rules of Court 2012 to strike out its claim.

[11] First, it is the appellant's submission that the learned Sessions Court Judge had erred in dismissing his writ and statement of claim on the ground that he should have invoked the procedure in O. 53 of the Rules of Court 2012. Second, the appellant also averred that the learned Sessions Court Judge had erred in agreeing with the respondent that the appellant's action "discloses no reasonable cause of action" within the meaning of O. 18 r. 19(1)(a) of the Rules of Court 2012.

[12] With regards to the wrong mode of commencement ground, the appellant submitted that there exists a valid cause of action by way of private law and, therefore, this case does not need to be initiated by judicial review proceedings. The appellant further argued that even if the court is uncertain as to whether there is any private law cause of action or whether this action ought to have been initiated by way of judicial review, the action ought not be summarily struck out. The appellant claimed that the Sessions Court should have proceeded to hear all the evidences prior to making any determination.

[13] The appellant relied primarily on the decision of the Federal Court in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865; [2010] 3 MLJ 145; [2010] MLJU 195; [2010] 1 MLRA 524 ("*Ahmad Jefri*") for the proposition that "not every decision made by an authoritative body is suitable for judicial review" and that "there must be sufficient public law elements in the decision made" before judicial review is deemed obligatory and the case of *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1; [2006] 2 AMR 563; [2006] 2 MLJ 389; [2006] 1 MLRA 166 which observed "that remedies for protecting both private and public rights can be given in private law proceeding and an application for judicial review".

[14] The appellant further underscored the point that his writ action was based on the following causes of action, namely, tort of negligence, tort of conversion and tort of trespass to land, and he was thus accordingly entitled to the legal remedies under the private law of negligence, tort of conversion and trespass to land.

[15] To substantiate his contention that these causes of action are in the sphere of private law, the appellant made reference to the decision of the Court of Appeal in the case of *OSK Trustees Bhd & Anor v. Metroplex Holdings Sdn Bhd* [2019] 10 CLJ 1; [2020] 3 MLJ 358; [2019] 4 MLRA 324 which duly explained the principle of tort of conversion and another decision of the High Court in *Jik Teck Piling Sdn Bhd v. Jopp Builders Sdn Bhd* [2014] CLJU 1916; [2014] 1 LNS 1916; [2016] AMEJ 0834; [2014] MLJU 1820; [2014] MLRHU 1429.

[16] The appellant also relied on two decisions by the High Court in *Perbadanan Pengurusan Rumah Pangsa Taman Tasik Utama Lot 11846 v. Metacorp Properties Sdn Bhd* [2018] 2 CLJ 246; [2017] AMEJ 1124; [2017] MLJU 2233; [2017] MLRHU 1008 and *Abdul Muthalib Hassan v. Maimoon Hj Abd Wahid* [1992] 1 CLJ 88; [1992] 2 CLJ (Rep) 5; [1992] 2 MLJ 108; [1991] 3 MLRH 437 on the law of the tort of trespass to land.

[17] Expectedly, the respondent adopted the diametrically opposing view and argued that first, the Sessions Court was correct in deciding that this action against the respondent should have been commenced by way of judicial review and second, the causes of action were or had not been clearly set out or pleaded.

[18] The respondent's position was that in initiating this action by way of a writ action instead of by way of judicial review, the appellant had abused the process of court.

[19] It is interesting to note that the respondent also relied on *Ahmad Jefri*. The respondent then went on to cite the following three cases, namely *Ahmad Amryn Abd Malek & Ors v. Bursa Malaysia Securities Bhd* [2021] 2 CLJ 222; [2020] AMEJ 0755; [2021] 8 MLJ 948; [2021] 1 MLRH 69; *Rosli Yang Danian v. Datuk Mohd Zain Mohd Dom & Ors* [2015] CLJU 1351; [2015] 1 LNS 1351; [2016] AMEJ 1011; [2016] 9 MLJ 669; [2015] MLRHU 1302 and *YKK (Malaysia) Sdn Bhd v. Pengarah Tanah Dan Galian Johor* [2021] 8 CLJ 179; [2021] 6 MLJ 496; [2021] MLRA 476, where in each of these three cases, the holding was that the actions in those cases should have been initiated by way of the judicial review procedure instead of a writ action.

[20] The nub of the respondent's second ground was that the appellant had failed to sufficiently plead the causes of action and this rendered the writ and statement of claim as disclosing no reasonable cause of action within the purview of O. 18 r. 19(1)(a) of the Rules of Court 2012. In support of this contention, the respondent relied on O. 18 r. 12 of the Rules of Court 2012 and the decision of the High Court in *Syarikat Logistik Petikemas Sdn Bhd v. Maruzen SH Logistics Sdn Bhd* [2020] CLJU 794; [2020] 1 LNS 794; [2020] 7 AMR 408; [2020] MLJU 1008; [2021] 2 MLRH 218.

The Applicable Law And Principles

[21] In support of the above respective contentions as outlined in paras. [10] to [20] above, both parties submitted numerous decided cases as authorities to support their respective positions. The principles enunciated in these cases are clear and do not require restatement.

[22] Order 18 r. 12 and O. 18 r. 19(1)(a) to (d) of the Rules of Court 2012 are two core provisions that affect the present appeal. These provisions provide as follows:

> Particulars Of Pleading (O. 18 r. 12)
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> 12. (1) Subject to paragraph (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing words:
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> (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and

A (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

(1A) No party shall quantify any claim or counterclaim for general damages.

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(2) Where it is necessary to give particulars of debt, expenses or damages and those particulars exceed three folios, they shall be set out in a separate document referred to in the pleading and the pleading shall state whether the document has already been served and, if so, when, or is to be served with the pleading.

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(3) The Court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or in any affidavit of his to stand as a pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just.

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(4) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party:

E (a) where he alleges knowledge, particulars of the facts on which he relies; and

(b) where he alleges notice, particulars of the notice.

(5) An order under this rule shall not be made before service of the defence unless, in the opinion of the Court, the order is necessary or desirable to enable the defendant to plead or for some other special reason.

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(6) Where the applicant for an order under this rule did not apply by letter for the particulars he requires, the Court may refuse to make the order unless the Court is of the opinion that there were sufficient reasons for an application by letter not having been made.

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(7) The particulars requested or ordered and supplied shall be served in accordance with Form 31.

Striking out pleadings and endorsements (O. 18 r. 19)

19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:

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(a) it discloses no reasonable cause of action or defence, as the case may be;

I (b) it is scandalous, frivolous or vexatious;

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[23] On the principle governing striking out, it came as no surprise that the appellant alluded to *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 2 AMR 1969; [1993] 3 MLJ 36; [1993] 1 MLRA 611 and *Mak Yan Tai & Anor v. Chia Moy King & Ors* [2020] CLJU 1022; [2020] 1 LNS 1022; [2020] MLJU 1334; [2020] MLRHU 1066 on the exercise of the court's powers under O. 18 r. 19(1)(a) of the Rules of Court 2012.

The Decision Of This Court

[24] Having carefully reviewed and analysed the cause papers, the submissions by the parties and the authorities, this court is of the considered view that the appellant was entitled to commence the action by way of writ.

[25] As remarked by the Federal Court in *Ahmad Jefri*:

> [62] We observed that a challenge on the use of appropriate procedure is very much fact based. Thus, it is necessary for a judge when deciding on such matter to first ascertain whether there is a public law element in the dispute. If the claim of infringement is based solely on substantive principles of public law then the appropriate process should be by way of O. 53 of the RHC. If it is a mixture of public and private law then the court must ascertain which of the two is more predominant. If it has substantial public law element then the procedure under O. 53 of the RHC must be adopted. Otherwise it may be set aside on ground that it abuses the court's process. But if the matter is under private law though concerning a public authority, the mode to commence such action under O. 53 of the RHC is not suitable.

[26] In this court's view, the above directives are clear. The key takeaways are that:

(i) the question as to which is the appropriate procedure to be used is dependent on the factual matrix of each case;

(ii) once it has been established that a claim is based solely on substantive principles of public law, then the appropriate process should be by way of judicial review;

(iii) if a matter is under private law though concerning a public authority, the judicial review procedure is not suitable; and

(iv) if it is a mixture of public and private law then the court must ascertain which of the two is more predominant.

[27] This court is of the considered view that the appellant's claim is not based solely on substantive principles of public law. Therefore, it is incorrect to conclude that the appellant's only recourse is by way of judicial review proceedings. As observed by the Federal Court in *Ahmad Jefri*, there is a need for a court to ascertain whether it is the public law or the private law element that is more predominant.

[28] This court is also of the view that the lapse of time argument is irrelevant if O. 53 of the Rules of Court 2012 is not the governing procedure.

[29] Likewise, after having thoroughly examined the cause papers, considered the arguments from both sides, and reviewed the legal precedents, this court is of the view that the causes of action have sufficiently been set out or pleaded in the statement of claim.

[30] There are issues pertaining to service of the various notices, the granting of consent/permission and elements of trespass and conversion that will have to be established and ventilated.

[31] In view of the above findings, this is not a plain and proper case for O. 18 r. 19(1)(a) to be invoked, that is, to justify the striking out of the writ and statement of claim.

[32] The decision of the learned Sessions Court Judge is set aside.

[33] The respondent to pay costs of RM5,000 to the appellant.